

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda Axworthy,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 983 C.D. 2011
	:	
Respondent	:	Submitted: October 14, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: December 8, 2011

Linda Axworthy (Claimant) petitions this Court for review of the May 9, 2011 order of the Unemployment Compensation Board of Review (UCBR) dismissing Claimant's appeal. Claimant presents one issue for this Court's review: whether Claimant's appeal was timely filed. For the following reasons, we affirm the UCBR's order.

Claimant worked as a full-time teacher for Art Learning Center (Employer) beginning October of 2003 and ending November 2, 2010. On November 2, 2010, Claimant was instructed by her director to input her observations of the children in her charge into the computer. Claimant refused, and Employer discharged her for failure to follow a directive. Claimant subsequently filed for unemployment compensation (UC) benefits. On December 1, 2010, the Scranton UC Service Center denied benefits under Section 402(b) of the Unemployment

Compensation Law (Law).¹ Claimant appealed, and a hearing was held by a Referee. On February 11, 2011, the Referee mailed his decision affirming the determination of the UC Service Center, but modifying the determination by basing it on Section 402(e) of the Law.² Claimant appealed to the UCBR; however, the Petition for Review was filed March 1, 2011. Claimant's last day to file an appeal was February 28, 2011. On March 17, 2011, the UCBR mailed a letter to Claimant advising that her appeal was untimely, and stating that if she had a reason to believe it was not untimely she should request a hearing by letter to the UCBR.

On March 22, 2011, Claimant mailed a letter to the UCBR requesting a hearing. A hearing was held by the Referee on April 20, 2011. On May 9, 2011, the UCBR dismissed Claimant's appeal as untimely under Section 502 of the Law.³ Claimant then appealed to this Court.⁴

Claimant argues that her appeal should be considered timely because her attorney testified at the hearing that her Petition for Review was mailed on February 28, 2011. Specifically, Claimant's attorney testified that he tried to fax the petition on Sunday, February 27, 2011, but received an error, so he told his assistant to mail it on Monday, February 28, 2011. Claimant contends that since her attorney testified that his assistant told him she mailed it Monday, and the UCBR received it Tuesday March 1, 2011, the appeal should be considered timely. We disagree.

Initially we note the general rule that, '[t]he appeal provisions of the law are mandatory: failure to file an

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

² 43 P.S. § 802(e).

³ 43 P.S. § 822.

⁴ This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

appeal within fifteen days, without an adequate excuse for the late filing, mandates dismissal of the appeal.’ If an appeal is not filed within fifteen days of the mailing of the determination, it becomes final, and the Board does not have the requisite jurisdiction to consider the matter. Appeal periods, even at the administrative level, are jurisdictional and may not be extended as a matter of grace or indulgence; otherwise, there would be no finality to judicial action. Therefore, an appeal filed one day after the expiration of the statutory appeal period must be dismissed as untimely.

Dumberth v. Unemployment Comp. Bd. of Review, 837 A.2d 678, 681 (Pa. Cmwlth. 2003) (citations omitted). Here, Claimant’s appeal was required to be filed on or before February 28, 2011. Claimant’s attorney attempted to fax her appeal on February 27, 2011, however, the fax transmission failed. It is well established that “[a] party filing an appeal by fax transmission is responsible for delay, disruption, interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed.” *Mountain Home Beagle Media v. Unemployment Comp. Bd. of Review*, 955 A.2d 484, 487 (Pa. Cmwlth. 2008) (quoting 34 Pa. Code § 101.82(b)(3)(ii)).

When the fax transmission failed, Claimant’s attorney directed that the appeal be mailed the next day. Claimant’s attorney testified that his assistant stated that she mailed the appeal on February 28, 2011, but there was no date specified on the postage meter mark. The UCBR regulations provide that when a postage meter mark is used, the filing date will be determined by “the date of [the] postage meter mark on the envelope containing the appeal.” 34 Pa. Code § 101.82(b)(1)(ii). However, “[i]f the filing date cannot be determined by . . . [the postage meter mark], the filing date will be the date recorded by the . . . [UCBR] when it receives the appeal.” 34 Pa. Code § 101.82(b)(1)(iii). Here, as evidenced by the time stamp, the UCBR received the appeal on March 1, 2011. Thus, Claimant’s appeal was filed on

March 1, 2011. Accordingly, Claimant's appeal was untimely and properly dismissed.

For all of the above reasons, we affirm the UCBR's order.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 8th day of December, 2011, the May 9, 2011 order of the Unemployment Compensation Board of Review is affirmed.

JOHNNY J. BUTLER, Judge

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OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE LEAVITT

FILED: December 8, 2011

Claimant proved that her appeal was mailed from Stroudsburg and received in Harrisburg on March 1, 2010. Logically, the appeal had to have been mailed on February 28, 2010, to reach Harrisburg the next day. However, given the Board's strict interpretation of its limited method for proving satisfaction of the mailbox rule, this Court has no choice but to affirm the Board's dismissal of Claimant's appeal. Ironically, the evidence offered by Claimant would have been sufficient to prove a timely appeal to a court of law.

Under the Board's regulation, an appeal that is placed with the U.S. Postal Service on the 15th day of the appeal period is timely. The documentary evidence shows that Claimant's appeal was mailed, and it shows that it was mailed from Stroudsburg. The postmark on the envelope does not show a date. However, the Board marked the appeal as having been received in Harrisburg on March 1,

2010, and in the proper office. In order for Claimant's appeal to have been received in Harrisburg on March 1, it had to have been placed in the U.S. Mail no later than February 28, 2010, given that it was mailed from Stroudsburg.

However, the Board permits only one way of proving a mailing on February 28, 2010, and that is with a *date* on the postmark. The Board's strict construction of its regulation at 34 Pa. Code §101.82(b) does not allow for the use of reasonable inference from documentary evidence or testimony from an officer of the court to establish a date of mailing.

Interestingly, Claimant's evidence, the envelope, the stamped receipt and her counsel's testimony would have been sufficient to prove a timely appeal to this Court. In *Miller v. Unemployment Compensation Board of Review*, 505 Pa. 8, 476 A.2d 364 (1984), our Supreme Court reversed this Court's decision to quash a petition for review of a decision of the Board because it lacked sufficient proof of timely mailing for purposes of PA. R.A.P. 1514(a). In reversing, our Supreme Court held that "substantial compliance" with the Pennsylvania Rules of Appellate Procedure was all that was required. *Miller*, 505 Pa. at 14, 476 A.2d at 367. The Court explained:

In cases such as this, however, where the record shows clearly and without dispute that a *petition for review was timely mailed prior to the 30-day jurisdictional deadline, where counsel for the appellant apprises the court of the record in that respect and timeliness can be determined from an examination of the records of the court, a fair and just interpretation of our rules makes a dismissal improper.*

Id. at 14-15, 476 A.2d at 367 (emphasis added).

I recognize that *Miller* is not controlling, but it is instructive. There is something wrong when the level of proof required for timely filing of a court

appeal is lower than that required for proving a timely appeal of an unemployment decision, especially given the very short statute of limitations of 15 days for perfecting an appeal of a Referee's decision to deny unemployment compensation. The Board should consider a "fair and just interpretation" of its rules of evidence.

MARY HANNAH LEAVITT, Judge